INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Argument	8
Conclusion	10

CITATIONS

Cases:

Helvering v. *Mitchell*, 303 U. S. 391 9

Higgins v. *Smith*, 308 U. S. 473 8

Statute:

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 23 2

Sec. 118 3

401379—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 200, 201

PIERRE S. DU PONT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

JOHN J. RASKOB, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Board of Tax Appeals (6 R. 1–103)[1] are reported in 37 B. T. A. 1198 and 1283. The opinion of the Circuit Court of Ap-

[1] The records in these two cases have been printed together, and, for the purpose of the petition for certiorari, consist of six volumes. The numerals preceding the letter "R" are here used to designate the volume number.

peals (6 R. 251–259) is reported in 118 F. (2d) 544.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 6, 1941 (6 R. 259–260), and petitions for rehearing were denied March 31, 1941 (6 R. 268). The petition for writs of certiorari was filed June 23, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioners duPont and Raskob purported to sell securities to each other on November 13 and December 26, 1929. In January 1930 they repurchased the securities from each other. The Board of Tax Appeals found that the transactions in November and December did not constitute real and completed sales but were consummated by mutual agreement for reacquisition of the securities, with the consequence that petitioners were not entitled to any deduction for losses in their income-tax returns. The question presented is whether the Board's finding is supported by substantial evidence.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.

* * * * *

(h) *Loss on sale of stock securities.*—For disallowance or loss deduction in the case of sales of stock or securities where within thirty days before or after the date of the sale the taxpayer has acquired substantially identical property, see section 118.

* * * * *

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be

allowed under section 23 (e) (2) of this title; * * *

STATEMENT

During the year 1929, the personal income of petitioner duPont from profit on securities exceeded $36,000,000 (4 R. 274; cf. 6 R. 158), and petitioner Raskob's income, exclusive of the amount in controversy, exceeded $9,000,000 (6 R. 162, 168, 175). In order to establish losses to reduce the amount of their taxable income, petitioners on November 13, 1929, and December 26, 1929, purported to sell securities to each other, which they subsequently on January 3 and January 27, 1930, repurchased from each other. The Government contended and the Board of Tax Appeals found that these pretended sales were lacking in bona fides, that they did not possess that reality essential to sales contemplated by the statute in allowing deductions for realized losses, and that they were contrived and consummated through mutual understanding and agreement of duPont and Raskob for reacquisition of the same securities in the manner the reacquisitions actually occurred (6 R. 99).

The pivotal question is whether the Board's ultimate conclusion is founded on substantial evidence. The preliminary findings upon which the Board based its ultimate finding are extensive (6 R. 4–45), and the evidence on which those pre-

liminary findings rest is voluminous. Obviously, we cannot set forth a full statement within the compass of this brief, and therefore respectfully refer the Court to the findings themselves in Volume 6 of the record for a more complete statement. However, we will here set forth a skeleton outline of the transactions involved, which alone is more than ample to sustain the ultimate finding.

1. *The November 13 sales.*—On November 13, 1929, du Pont and Raskob purported to sell to each other securities aggregating somewhat over $4,500,000 each (6 R. 6–7). Raskob personally delivered his check to duPont's secretary with instructions not to deposit it until he had received duPont's check (6 R. 9). Thereafter, Raskob personally placed both checks and deposit slips in a single envelope and caused them to be delivered on November 15, 1929, to a receiving teller of the main office of the Bankers Trust Company, notwithstanding that Raskob's account was with the 57th Street Branch of that bank (6 R. 9). Although the balance in du Pont's account was sufficient to meet his check without previously depositing Raskob's check, the closing balance in Raskob's account on each of the days during this period was less than $40,000 (6 R. 10). The prices at which the securities were sold appear to have been arbitrarily selected, and did not have any common denominator of consistency based upon

either low, high, open, or close of the market for November 13, 1929 (6 R. 8–9, 58–66).

On January 6, 1930, petitioners repurchased from each other the identical number of units of the same securities which they had purported to sell to each other on November 13, 1929, and again the checks were transmitted together to the same bank for simultaneous deposit (6 R. 14–20).

2. *The December 26 sales.*—The petitioners had meanwhile, on December 26, 1929, purported to sell other securities to each other aggregating about $1,560,000 each (6 R. 21–24). On January 27, 1930, they repurchased those securities from each other. Prior to leaving for Florida where he remained until the end of March 1930, Raskob had on January 10, 1930, signed blank checks and wrote and signed two letters to du Pont post-dated January 27, 1930, confirming the repurchase and resale of the securities which were the subject of the December 26, 1929, transaction. These letters and checks were left in the custody of Raskob's secretary, together with a power of attorney signed in blank for the transfer of the securities (6 R. 25–28).

3. *The "short sale."*—As a result of the divergent market fluctuations of the various securities between the respective date of each of the reciprocal sales and their reversals, a substantial balance arose in du Pont's favor against Raskob. However, on January 3, 1930, both petitioners en-

tered into a rather extraordinary transaction, denominated as a "short sale" which was finally closed out late in January 1930, and as a consequence of that transaction, after adjustments were made for stamp taxes, dividends paid on the securities of each while in the hands of the other, *the ultimate cash difference between the petitioners on all their transactions aggregating over $29,000,000 was only $46.86.* (See Chart, 4 R. 389.) The details of the "short sale" transaction are too involved for concise restatement here, and we therefore refer the Court to pages 30–39 of Volume 6 of the Record for a full account.

Thus, when the "short sale" is taken in conjunction with the two sets of reciprocal sales and their reversals, it appears that both petitioners ended up with the identical securities [2] that they started out with, and that when the smoke had cleared away, they were only $46.86 apart.

The Board of Tax Appeals concluded that the so-called short sale "was intended to be what it actually resulted in, a transaction balancing in effect the accounts between the two parties" (6 R. 83, 73–84), and that (6 R. 99–100):

> Upon consideration of all the evidence, we hold that neither of the pretended sales of stocks between du Pont and Raskob was a

[2] Not only did each reacquire the identical securities sold to the other, but with only two exceptions each reacquired the identical reissued certificates (6 R. 39).

> bona fide complete disposition thereof, and did not possess that reality indispensable to sales contemplated by the statute as to deduction of realized losses, but that both were contrived and consummated through mutual understanding and agreement between the two parties for the reacquisition of the stocks originally owned by each, by the reversal of the sales in the manner in which they were reversed, agreement in the first sale inhering as a part of the original plan and transaction, and in the second sale occurring at the time of the sale or within 30 days thereafter. * * *

Accordingly, deductible losses aggregating over $5,000,000 for both petitioners (6 R. 3, 103) were disallowed (6 R. 100). The Circuit Court of Appeals affirmed.

ARGUMENT

The basic principles involved are firmly established. The deductible loss must rest upon a sale in which the taxpayer has made a final disposition of the property involved. Where the sale is made to a wholly-owned corporation, the continuing control of the sole stockholder over the property deprives the sale of finality *per se,* and the loss cannot be allowed. *Higgins* v. *Smith,* 308 U. S. 473. Where the sale is between individuals, lack of finality may be shown by proof of intention of the parties to restore the property to the vendor, or proof that the parties never intended any bona fide

disposition.[3] Cf. *Helvering* v. *Mitchell*, 303 U. S. 391.

The Board of Tax Appeals in this case found that the transfers of November 13, and December 26, 1929 did not constitute real and completed sales, but were consummated by mutual agreement for reacquisition of the securities (6 R. 45, 99–100). That finding is more than amply supported by the record. Indeed, it is so fully supported that the appeal to the court below was wholly without merit, and further review in this Court would be unwarranted.

The alleged conflicts urged by petitioners (Pet. 15–16), all involved cases where the loss had been allowed by the Board of Tax Appeals or by the District Court and in which the circuit courts of appeals had refused to disturb the dispositions below.

---

[3] Where there is a reacquisition within 30 days, the statute in effect creates an irrebuttable presumption that the sale was not intended to be final, and automatically disallows the deduction. See Section 118 of the Revenue Act of 1928, *supra*, p. 3. Here, however, the petitioners were careful to reacquire the securities shortly after the expiration of the 30-day period, and lack of finality must therefore be shown by proof of intention, agreement, or understanding of the parties. But even where the repurchase occurs after the 30-day period, Section 118 is applicable if there was an agreement for repurchase arrived at within the 30-day period, and the ultimate finding of the Board (6 R. 99–100) that there was such an agreement or understanding here supports the application of Section 118. Thus the existence of such agreement forbids the deduction under Section 23 (e) and calls into play Section 118 as well.

CONCLUSION

The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
ARNOLD RAUM,
Special Assistants to the Attorney General.

JULY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

314 (12)

NOV 6 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

Nos. 200, 201

PIERRE S. DU PONT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JOHN J. RASKOB,
Petitioner,

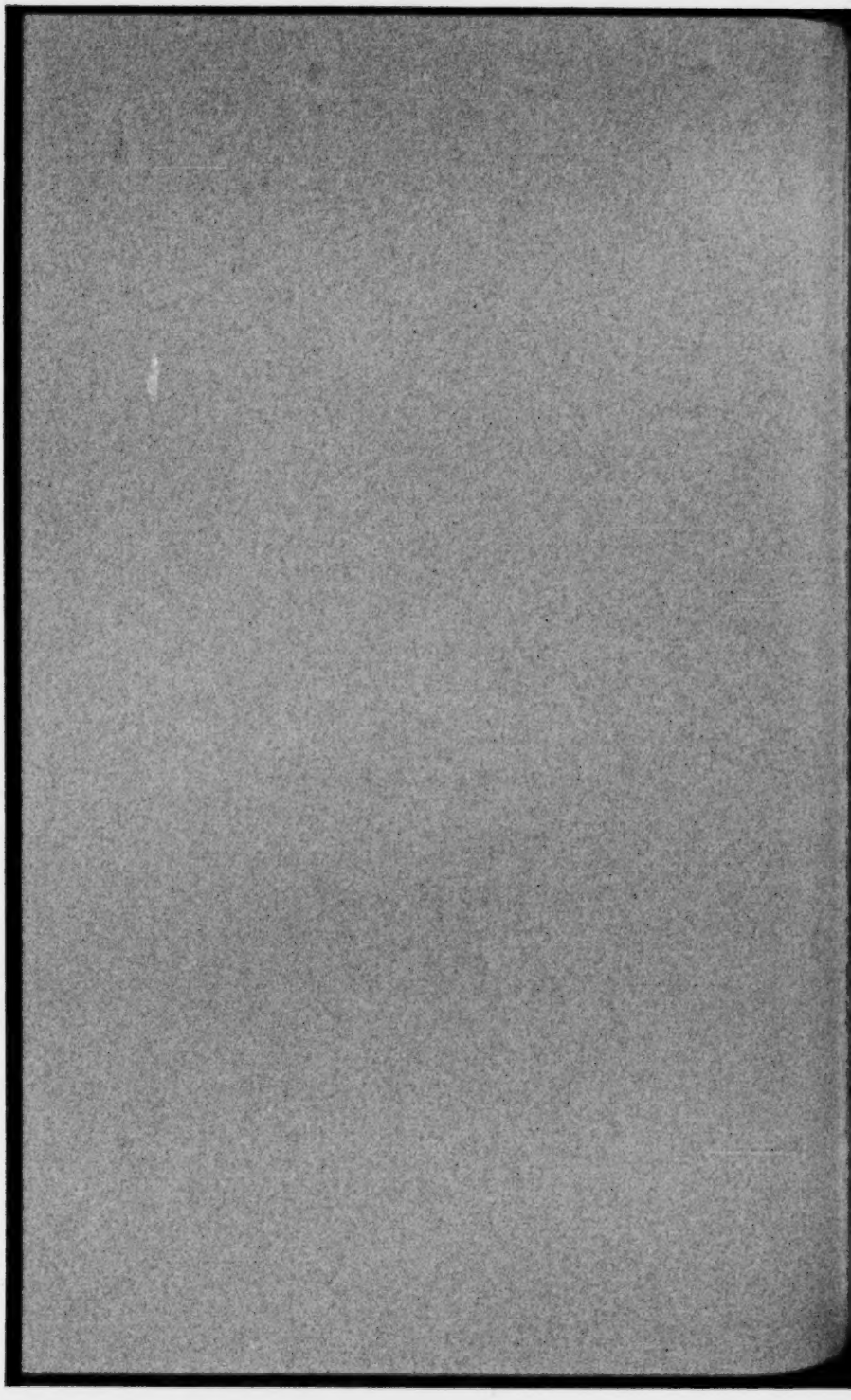
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR RECONSIDERATION OF THE PETITION FOR WRITS OF CERTIORARI

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

Post Printing Company, Inc., 86 Lafayette Street, New York, N. Y.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 200, 201

PIERRE S. DU PONT,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JOHN J. RASKOB,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR RECONSIDERATION OF THE PETITION FOR WRITS OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners pray for reconsideration of the Petition for Writs of Certiorari herein, denied October 13, 1941, and respectfully show:

(1) In the Petition for Writs of Certiorari, one of the reasons given for granting the writ (reason No. 5) was that

the *Raskob* case involves the question, created by this Court's decision in *Higgins* v. *Smith,* 308 U. S. 473, of the proper cost basis to a purchaser of property acquired on a sale not considered to result in a deductible loss to the seller. We respectfully reiterate that, since this is a question of general importance, in the interest of satisfactory administration of the tax law, the uncertainty, created by this Court's decision in *Higgins* v. *Smith,* should be dispelled.

It would seem significant that, in opposing the Petition for Writs of Certiorari, the Departmet of Justice opposed only on the main question of the deductibility of the losses on the sales, and interposed no objection to the granting of the writ on this further question.

(2) As pointed out in the Petition for Writs of Certiorari (p. 16), the decision of the Circuit Court is inconsistent, if not directly in conflict, with the decision of this Court in *Helvering* v. *Johnson,* 308 U. S. 523. In the recent case of *Deputy* v. *Du Pont,* 308 U. S. 488, 490, the Supreme Court granted certiorari, on the application of the Government, "because of the asserted inconsistency of" the Circuit Court ruling in favor of the taxpayer with prior decisions of the Supreme Court. The taxpayer in the *Deputy* case is one of the petitioners here. We respectfully submit that the reason given for granting certiorari in the *Deputy* case is present here. If such reason is considered adequate on the petition of the Government there would seem to be no good reason why it should not be considered adequate upon the petition of the taxpayer.

This case involves tax liability for the year 1929. The question which was the subject of the *Deputy* case was involved in this case.[1] It would seem only fair that the

---

[1] 7 R. 127-143.

Supreme Court, having granted certiorari on the petition of the Government and decided one of the questions determining the taxpayer's 1929 Federal income tax liability, it now should grant certiorari on the petition of the taxpayer and decide the remaining question as to that year, when the reason for granting certiorari on the earlier issue is also present with respect to the remaining issue.

There is far greater reason for granting certiorari here than there was in the *Deputy* case. There the District Court,[2] and this Court,[3] considered that the facts "were 'beyond the norm of general and accepted business practice' and were in fact 'so extraordinary as to occur in the lives of ordinary business men not at all' and in the life of the taxpayer 'but once.' "[4] In his dissenting opinion Justice Roberts found that the majority reached "a conclusion based solely upon the peculiar facts of this single case."[5]

On the other hand, it is safe to say there is no single tax question which has arisen more often and which has caused more confusion than the question involved here, namely, the degree of severance from property necessary to result in a deductible loss. The Circuit Court found that the decisions on this question are in "chaos" (6 R. 254). So far as known, the Supreme Court has never considered the question except in the cases of *Higgins* v. *Smith, supra,* and *Helvering* v. *Johnson, supra.* In those two cases different conclusions were reached. There is thus far greater reason from the standpoint of general

---

[2] 22 F. Supp. 589, 597.

[3] 308 U. S. 488, 495.

[4] Respectful exception is taken to this statement. It is believed it was an erroneous characterization of the situation involved there.

[5] 308 U. S. 488, 501.

importance of the question for granting certiorari here than there was in granting certiorari in the *Deputy* case.

Under the circumstances, it is submitted even-handed justice dictates that the Supreme Court should reconsider the Petition.

(3) Shortly after the Circuit Court decision was rendered, the Honorable Judge Joseph Buffington, one of the three Circuit Judges who heard the case, gave testimony in court[6] which establishes that at the time of the argument of this case he was eighty-four years of age,[7] that for a number of years he had enjoyed very little sight or hearing,[8] that in December 1939, three months before the argument in this case,[9] he had an operation for cataract as a result of which he was unable to read or write for three months,[1] that this operation gave him a dreadful shock,[2] that he used no one to help him in reading briefs and records,[3] that he employed no hearing device in court,[4] and that he sometimes left the bench after argument without the information he should have had.[5]

---

[6] In the proceeding *United States* v. *J. Warren Davis and Morgan S. Kaufman* (U. S. D. C., E. D. Pa.), Docket No. 8969, March Sessions 1941, Hearing dates May 23, 1941 and August 6, 1941. The complete testimony of Judge Buffington is set forth in the Appendix.

[7] Appendix, p. 8.

[8] Appendix, pp. 13-17, 19, 20, 24, 34-40, 45, 52, 65, 66.

[9] 6 R. 250, 251.

[1] Appendix, pp. 15, 65, 68.

[2] Appendix, pp. 64, 65.

[3] Appendix, pp. 17, 18.

[4] Appendix, p. 37.

[5] Appendix, p. 46.

It was quite apparent at the argument of this case that Judge Buffington could hear very little of what was being said by counsel. The record in this case consisted of seven volumes. The Circuit Court briefs covered over four hundred pages. In view of his testimony in the *Davis* case, the inference seems almost inescapable that Judge Buffington was able to read very little of the material which proper consideration of this case would require.

By reason of this situation, it is quite possible the interests of Petitioners have been gravely prejudiced. It is reasonable to speculate that a different result might have been reached if Judge Buffington's faculties of sight and hearing had been more normal, or if a Judge fully possessed of his faculties had sat in his place.[6] It is, of course, no answer that the decision of the Circuit Court was unanimous. Presumably, this Court will readily concede the sole function of an appellate judge is not merely to cast a vote. If one of the Circuit Judges had died at the conclusion of the oral argument clearly a reargument would have been required even though the remaining two judges were then in agreement. Indeed, if Judge Buffington had given his testimony in the *Davis* case after the oral argument here and before the Circuit Court decision, it is to be assumed a motion for reargument would have been granted.

Petitioners may or may not have a remedy as a matter of law because of this situation. If this Petition for Reconsideration should be denied it will be necessary to determine that question. It seems possible, although the statement is made without prejudice, that the equities are not such as are afforded a legal remedy. Accordingly, the facts are being brought to this Court's attention now. Certiorari being a matter of discretion, it is in the power of this Court by granting the Petition for Writs of Certiorari and

---

[6] *Cf.* dissenting opinion in the Board of Tax Appeals (6 R. 100).

reviewing the case to remove the possibility of a miscarriage of justice which is inherent in this peculiar situation.

It is unnecessary to contend that this in itself is a sufficient reason for granting the Petition. It is additional to the other reasons presented.

WHEREFORE, it is earnestly prayed that the Court reconsider the Petition for Writs of Certiorari and grant the same.

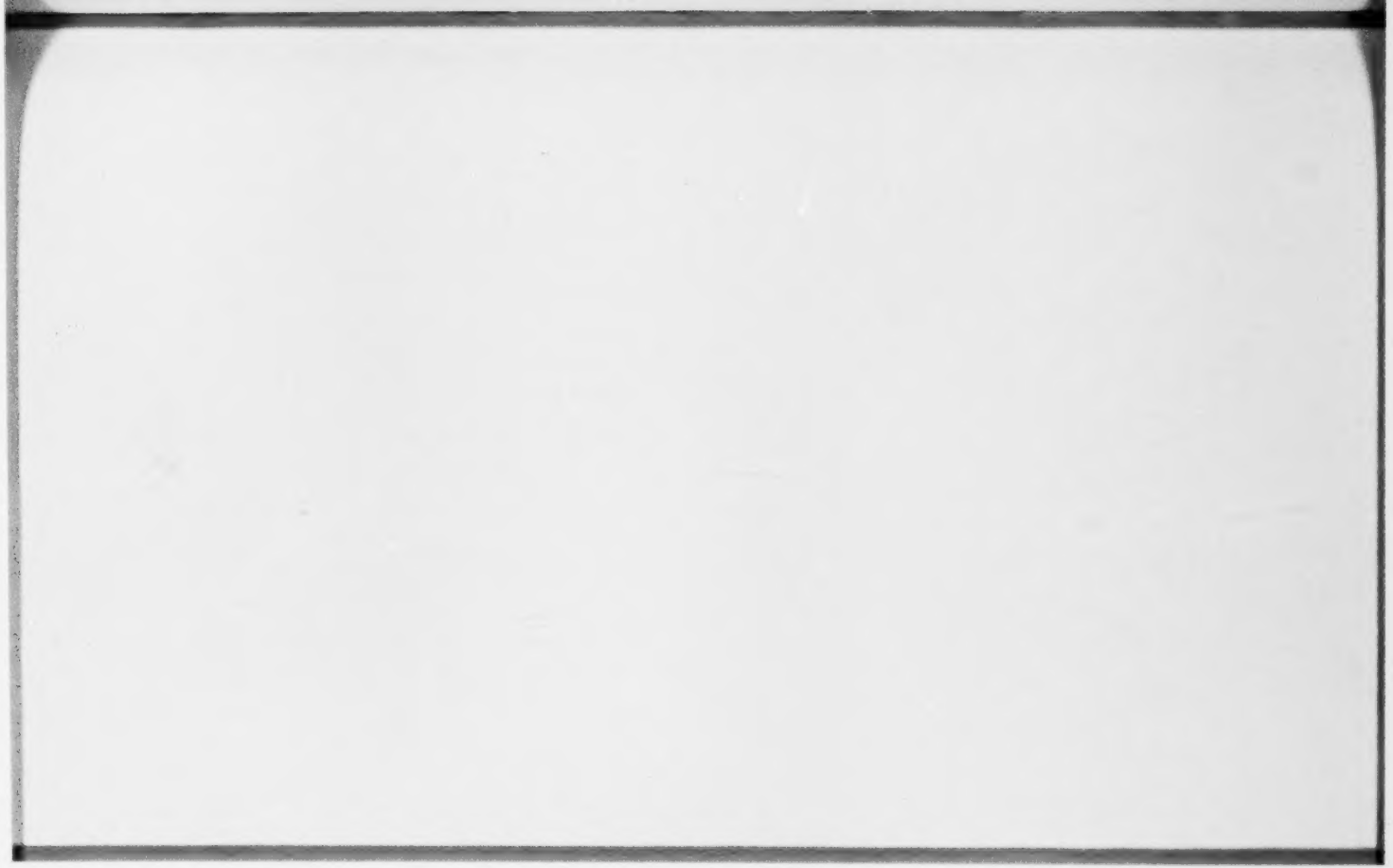
Respectfully submitted,

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

We certify that this Petition is presented in good faith and not for delay.

JOSEPH M. HARTFIELD,
WALTER S. ORR,
A. CHAUNCEY NEWLIN,
Counsel for Petitioners.

November 1941.



APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, v. J. WARREN DAVIS and MORGAN S. KAUFMAN.	No. 8969 March Sessions, 1941.

Before HON. ROBERT N. POLLARD, J., and a Jury.

May 23, 1941

AFTER RECESS

Present: Counsel as before noted.

Mr. Gahagan: The Government calls the Honorable Judge Joseph Buffington.

JOSEPH BUFFINGTON, having been duly sworn, was examined and testified as follows:

By Mr. Gahagan:

Q. Judge Buffington, did you hold a position as senior circuit judge of the Third Circuit Court of Appeals for many——

Mr. Gray: We can't hear you.